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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1973

No. 73-1128

MAURY D. DICKS AND GRACE I. DICKS, d/b/a OZARK GARDENS RESTAURANT; GILBERT STORK AND IRENE STORK, d/b/a LUNCH BOX AND CAMPER COURT; IRENE BURROW AND CLAUDIA ACKERMAN, d/b/a DAIRY DESSERT; JACK DAVEY, d/b/a LAND OF NOD MOTEL AND HARPER'S MOTEL, INC. ..... *Petitioners*

VS.

FRED NAFF, MAYOR, COUNCILMAN AND MEMBER OF CITY TOURIST PROMOTION COMMISSION, EUREKA SPRINGS, ARK.; KATHERINE GREEN, CITY CLERK OF EUREKA SPRINGS, ARK.; C. J. TYSON AND BILL HILL, COUNCILMEN AND MEMBERS OF CITY TOURIST PROMOTION COMMISSION, EUREKA SPRINGS, ARK.; CHARLES FREEMAN, BOBBY BALL, MRS. PAUL MITCHELL AND MISS NANCY CLARK, COUNCILMEN, EUREKA SPRINGS, ARK.; MRS. ANNA BJORKMAN, CALVIN MCGEE, JOHN CALDWELL AND MRS. L. B. WILSON, MEMBERS OF CITY TOURIST PROMOTION COMMISSION, EUREKA SPRINGS, ARK. ..... *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

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ON PETITION FOR A WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

OPINION BELOW

The opinion of the Arkansas Supreme Court has not yet been reported. This opinion is set out in the Appendix, pp. a-1 to a-8.

JURISDICTION

The Supreme Court has jurisdiction to review this judgment on appeal pursuant to 28 U.S.C. Sec. 1257:

> "Final judgments . . . rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * *
>
> (3) By writ of certiorari, . . . where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution . . . of the United States. . . ."

The final judgment sought to be reviewed by this Court was delivered by the Supreme Court of Arkansas, the highest court in the State of Arkansas, on October 22, 1973.

STATUTE AND ORDINANCE INVOLVED

The statute in question is Ark. Stat. Ann. §§19-4613 to 4617 (Supp. 1973). The Ordinance is Ordinance No. 936 amended by No. 942 of the City of Eureka Springs, Arkansas. Due to the length of these provisions, they are set out in the Appendix, pp. b-1 to c-9.

QUESTIONS PRESENTED

POINT I

THE COURT ERRED IN DECLARING ACT 185 OF THE 1965 ACTS OF ARKANSAS, AS AMENDED IN 1969 AND 1971, AND ORDINANCE NO. 936 OF THE CITY OF EUREKA SPRINGS, ARKANSAS, AS AMENDED, CONSTITUTIONAL.

A.

Act 185 of the 1965 Acts of Arkansas unreasonably, arbitrarily and without just distinction creates a separate class for taxation consisting of hotels, motels and restaurants.

B.

The classification made by Act 185 of the 1965 Acts of Arkansas, as amended, does not rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly situated shall be treated alike.

C.

Ordinance No. 936, as amended, of the City of Eureka Springs, Arkansas, unreasonably, arbitrarily and without just distinction creates a separate class for taxation purposes consisting of hotels, motels and restaurants.

D.

The classification made by Ordinance No. 936, as amended, of the City of Eureka Springs, Arkansas, does not rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly situated shall be treated alike.

POINT II

ACT NO. 185 OF 1965 AS AMENDED IS UNCONSTITUTIONAL UNDER THE EQUAL PROTECTION GUARANTEES OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

A.

The proviso of Ark. Stat. Ann. Sec. 19-4613 providing for elections is not severable from the remainder of Act 185 of 1965 as amended.

B.

The proviso of Ark. Stat. Ann. Sec. 19-4613 is unconstitutional in that it arbitrarily and capriciously discriminates against the smaller cities of the first class.

C.

The court erred in denying the petitioners' standing to challenge the constitutionality of the election proviso of Ark. Stat. Ann. §19-4613.

POINT III

THE COURT ERRED IN RELYING ON TESTIMONY OF THE STATE'S WITNESS AFTER AFFIRMING THE TRIAL COURT'S HOLDING THAT THE TESTIMONY WAS INADMISSIBLE.

STATEMENT OF THE CASE

In the year 1965, the Arkansas State Legislature enacted Act 185 of the 1965 Acts of Arkansas, by which act a City of the First Class having a population of not less than 25,000 inhabitants could, by ordinance of the governing body of such city, levy a 1% tax upon the gross receipts or gross proceeds of what amounted to Hotels, Motels and Restaurants. That act further provided that 500 qualified electors of such a city could force the matter to be submitted to the voters by petition. That Act was subsequently amended in 1969 and 1971 to delete the population requirement of 25,000 and allow any City of the First Class to enact the tax, but retaining the same petition requirement.

On or about the 4th day of May, 1972, the City Council of the City of Eureka Springs, Arkansas, enacted Ordinance No. 936, which ordinance was enacted pursuant to the enabling authority of Act 185 of the 1965 Acts of Arkansas, as amended, which Act was codified as Ark. Stat. Ann. Sec. 19-4613, et seq. The Ordinance No. 936 as passed tracked the enabling statute and act with only one exception, such being the inclusion of campgrounds as one of the classes to be taxed. Ordinance No. 936 was subsequently amended by the City Council through Ordinance No. 942 to delete the inclusion of campgrounds.

The petitioners herein, are the owners or operators of various hotels, motels and restaurants within the city limits of Eureka Springs, Arkansas, and upon whom, or or upon whose businesses, a tax has been levied pursuant to the enabling legislation and resulting ordinance as already set forth hereinabove.

Certain stipulations of fact were entered into by and between the attorneys for both petitioners and respondents

which, when considered with the testimony of the witnesses offered by the petitioners, clearly establish that there is indeed another class of businesses in Eureka Springs, Arkansas, other than hotels, motels and restaurants, which is not subject to the tax, but which bears the same or similar relationship, if not identical, to the tourist trade as do hotels, motels and restaurants. The petitioners contended that the classification of hotels, motels and restaurants by the legislature of the State of Arkansas and by the City Council of Eureka Springs, Arkansas, to bear the brunt of a tax for promoting tourism locally was arbitrary and capricious and as such, was an unconstitutional classification under both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States of America. The petitioners further contended that larger cities of the first class were afforded some electoral relief which was denied the smaller cities of the first class, of which the city of Eureka Springs qualified, and consequently discriminated against such smaller cities in violation of the equal protection guarantees of the Fourteenth Amendment to the Constitution of the United States of America.

After hearing all the evidence in the cause, receiving the briefs of the parties and the stipulations of fact, the Court ruled that the enabling legislation, Act No. 185 of the 1965 Acts of Arkansas, as amended, was not unconstitutional and further that the Ordinance No. 936 of the City of Eureka Springs, Arkansas, as amended, was not unconstitional. The Court entered a judgment against the plaintiffs (petitioners) for the defendants (respondents) and dismissed the complaint of the plaintiffs (petitioners) from which action and judgment an appeal was taken. The Arkansas Supreme Court affirmed the ruling.

ARGUMENTS FOR THE ALLOWANCE OF THE WRIT

I. DENIAL OF DUE PROCESS AND EQUAL PROTECTION

A. *Is the Equal Protection Clause a Limitation on the States' Taxing Power?*

The Supreme Court has developed two distinct tests in applying the Equal Protection Clause of the Fourteenth Amendment. The oldest test, and the one used by the Arkansas Supreme Court in this case, is stated in *Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920):

> . . . the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

This equal protection test has given way to stricter scrutiny by the Court in instances where a fundamental right is at stake or where a suspect criteria is used as a basis for the classification. If either of these elements is present the burden shifts to the state to show an overriding state interest. *Shapiro v. Thompson,* 394 U.S. 618, 658 (1969) (Justice Harlan's dissent).

However, even where these elements are not present, where the older test is used there still seems to be two tests — one for tax and economic regulation cases and one for other cases involving so-called "personal" rights. Examples of these different tests, or rather, different treatments of the same test, are the way the Court deals with the relation of the difference in treatment to the purpose of the statute, and in the way the Court determines the purpose itself.

Different Treatment

In non-economic cases the Court has scrutinized the relationship between different treatment and the purpose of the statute. In matters of taxation or economic regulation the Court has tended to look for the differences in the parties alone rather than the relationship between such differences and the purpose of the statute.

In *Tax Commissioners of Indiana v. Jackson*, 283 U.S. 527 (1931), a tax case, the Court held that:

> "[i]t is not the function of this court . . . to seek for the motives or to criticize the public policy which prompted the adoption of the legislation. Our duty is to sustain the classification adopted by the legislature if there are substantial differences between the occupations separately classified. Such distinctions need not be great."

The court did not discuss the purpose of the tax, which was obviously to hamper the operation of and competition from chain stores. To do so would have been to look at the "motive" of the legislators (or the department store lobby). The Court's discussion centered on the differences in the operation of a chain store and a department store, followed by a series of prior cases which had been dealt with the same way.

In *Daniel v. Family Security Life Ins. Co.*, 336 U.S. 220 (1949), some years later, the Court reiterated this practice of not looking at the purpose in a case involving an economic regulatory statute. The state of South Carolina prohibited funeral homes from selling funeral insurance. The Court refused to consider the insurance lobby's part in passing the statute, and held:

> "We cannot undertake a search for motive in testing constitutionality."

The Court did not entirely overlook the issue of the purpose of the statute. They simply overlooked the obvious purpose and conjectured that the state might well have been concerned about,

> "the beneficiary's tendency to deliver the policy's proceeds to the agent-undertaker for whatever funeral the money will buy, whether or not an expensive ceremony is consistent with the needs of the survivors."

However, the Court did not rely on this as the true purpose of the statute. They held that North Carolina had the right to "call the funeral insurance business an evil," and further reiterated that the Court could not actually inquire into the "relation" of the statute to the "elimination of those evils."

This type of cursory treatment was rejected for cases dealing with "personal" rights. The case of *Carrington v. Rash*, 380 U.S. 89 (1965), overruling a Texas constitutional provision prohibiting members of the armed forces from voting in Texas, held:

> ". . . the fact that a State is dealing with a distinct class and treats the members of that class equally does not end the judicial inquiry. 'The Courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose.' "

Other personal rights cases have followed this method of inquiry. In *Baxtrom v. Herold*, 383 U.S. 107 (1966), the different commitment procedures for persons imprisoned

and those who had not been incarcerated was found to have no relevance to whether a person should have an opportunity to show the presence or absence of mental illness. *Rinaldi v. Yaeger,* 384 U.S. 305 (1966), found no reasonable relationship between the different treatment in appeals given indigent prisoners who were imprisoned and those who were placed on probation or given suspended sentences, and the purpose of the statute — the state's reimbursement for the cost of the transcript. In *Reed v. Reed,* 404 U.S. 71 (1971), the purpose of lessening the probate court workload by preferring men over women as administrators of estates, was found to have no relation to the differences between men and women.

Purpose

Where the purpose of a statute is considered in an economic regulation case, the Court has felt free to assume a purpose on its own, whereas in a "personal" rights case, the Court looks only at the statute and the purposes avowed by the state. In *Rinaldi v. Yaeger, supra,* the indigent appeals case, the Court stated that in determining the purpose of the statute they reviewed its legislative history, the title of the act, and provisions of the act itself. The opinion emphasized that "the Court clearly looks to the *actual* and *real* purpose of the act and compares the same to the classification. . ." (at 384). (Emphasis added.) That statement, however, seems to apply only to the so-called personal rights cases. Tax cases and those involving economic regulation have been upheld on "any conceivable" purpose or reason. See the discussion in "Developments in the Law — Equal Protection," 82 Harv. L. Rev. 1065 (1969).

Neither in *Goeseart v. Cleary,* 335 U.S. 464 (1948), nor in *Kotch v. Board of River Port Pilot Commissioners,* 330

U.S. 522 (1947), did the Court deal with the obvious purpose of job monopolization. Instead, in *Goeseart* the Court conjectured that "bartending by women *may*, in the *allowable* legislative judgment, give rise to moral and social problems." (Emphasis added.) In *Kotch* the Court looked at a Louisiana statute which promoted the certification as new pilots of relatives of incumbent river boat pilots. The Court found a more permissible, if somewhat contrived, purpose as "public safety," Justice Black mentioning the "benefits to morale and esprit de corps which family and neighborly tradition might contribute." See also the discussion of *Daniel v. Family Security Life Ins. Co.* (1949), above.

As pointed out in the preceding discussion, the Court has allowed much more discrimination in taxing and regulatory statutes than in any other area. One of the reasons given for allowing the state to exclude some of those "similarly situated" from the effects of the statute, what some writers have called "under-inclusiveness," has been that there "is no requirement of equal protection that all evils of the same genus be eradicated or none at all." *Railway Express Agency v. New York,* 336 U.S. 106, 110 (1949). See also, Tussman and tenBroek, "The Equal Protection of the Laws," 37 Cal. L. Rev. 341 (1949). This reasoning may well apply to cases where the state is attempting to regulate business practices for the common welfare, where the state actually is trying to eradicate evils. However, where there is no "evil to eradicate" and where there is obviously no reason for the difference in treatment other than arbitrary selection, we urge that the Court require strict adherence to the rule that all those similarly circumstanced be treated the same. The Court has applied this rule in only one economic case since the late 1930's when the *Lochner* decision was overruled. In

Morey v. Doud, 354 U.S. 457 (1957), the Court struck down the discriminatory regulation of money order sales which created a closed class of favored treatment for one particular company. We submit that the Court should extend this requirement of similar treatment to taxing cases also.

The Court has intimated that another reason for treating tax and regulatory cases differently is that the proper remedy for the citizenry in economic matters is at the polls. *Williams v. Lee Optical*, 348 U.S. 483 (1955); *Green, et al, v. Frazier*, 253 U.S. 233 (1920). In tax matters as in other equal protection matters, resort to the courts is, or should be, a proper remedy. It is the minority who are usually denied equal treatment and who are unable to effectively take the matter to the polls. Especially in this case. Because of the size of the town and the constant number rather than a percentage that is required by *Ark. Stat. Ann. Sec.* 19-4613, the number of voters' signatures required on a petition to get the measure to the polls would be sufficient to defeat the measure in the elections. In our system of checks and balances, the courts assure the individual of equitable treatment by the majority.

We are not asking the Court to return to the foresworn practices of the *Lochner* era. *Lochner v. New York*, 198 U.S. 45 (1905); *Adair v. United States*, 208 U.S. 161 (1908); *Coppage v. Kansas*, 236 U.S. 1 (1915); and *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), all struck down statutes which sought to protect labor. *Lochner* proscribed minimum hours, *Adkins* proscribed minimum wages, and *Adair* and *Coppage* dealt with discrimination against union members. We are in complete agreement that the state has the right to protect one section of the populace from another. However, in not restricting the states' efforts to protect

the public, the Court should not allow their self-imposed restraint to foreclose use of the Equal Protection Clause to protect the public from the state.

If equal protection is indeed an affirmative duty placed on the states, we submit that citizens who are taxed by the state should be given as much equal protection as those discriminated against by other means. The Court should not merely grasp at differences between two similarly situated groups who are taxed differently; it should judge whether there is a relationship between any difference and the purpose of the statute. The Court should recognize the obvious purpose of a statute and should not try to credit the legislature with a more permissible motive.

It has been years since the Court entertained an economic equal protection case and there are several questions that need to be resolved if the Court should decide to begin reviewing these cases once more.

B. *Classification*

If the test set forth in *Royster Guano Co. v. Virginia, supra,* is to be used (it was used by the Arkansas Supreme Court), what is the basis for determining classification? Is a class "all persons similarly circumstanced," or is it confined to those members enumerated by the legislature? Some cases have been worded as if it were the former (*Carmichael v. Southern Coal & Coke Co.,* 301 U.S. 495 (1937), and cases cited), while other decisions have been worded as if it were the latter (see the Arkansas Supreme Court's decision pp. a-3 — a-4, also *Walters v. City of St. Louis,* 347 U.S. 231, 237 (1954); *Tax Commissioners of Indiana v. Jackson,* 283 U.S. 527, 537 (1931); *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61, 78 (1911)). We submit that

the determination of classification should be clarified by the Court to require taking into account the total statute and the surrounding circumstances. Those members enumerated by the legislature may well be underinclusive. The enumeration may fail to include or to burden other members of the class — other members similarly situated.

C. *Purpose of the Legislation*

One of the considerations in determining those "similarly circumstanced" should be the object that the legislature is trying to further. The Arkansas Supreme Court asserted that *New York Rapid Transit Corp. v. New York*, 303 U.S. 573 (1938), stands for the proposition that the purpose or object of every taxing statute is to raise money. In reviewing the cases that have been discussed above, one can see that in many instances raising money is purely incidental. The actual purpose of a statute may be regulation through taxation, the tax may be a sort of tariff to encourage one business or discourage another. The *New York Rapid Transit* case does say that "the provisions of the legislation earmarking the funds collected are not of importance," and that "it is not constitutionally necessary that the classification be related to the appropriation" (p. 587). But where there *is* a relation between the classification and the appropriation, should not this relationship be taken into account in determining not only whether others are similarly situated, but whether the legislature's allocation of the tax burden is underinclusive — does not include the whole class — and is therefore prima facie discriminatory? (See Tussman & tenBroek, 37 Cal. L. Rev. at 348.)

The proper question would then be whether this

underinclusiveness or difference in treatment is based upon some reasonable, permissible ground, itself having some relation to the object of the legislation. This leads to the largest problem in challenging any taxing statute — the burden of proof.

D. *Burden of Proof*

There is a presumption of constitutionality in economic equal protection cases. *Walters v. City of St. Louis*, 347 U.S. 231, 237 (1954); *Madden v. Kentucky*, 309 U.S. 83 (1940); *Green v. Frazier*, 253 U.S. 233, 239 (1920). This presumption and the corresponding burden of proof which falls on the plaintiff has been justified by the legislators' enjoyment of "a familiarity with local conditions" in which the courts do not share. *Madden v. Kentucky*, 309 U.S. at 88. In our case, however, the state legislature has denied the local city council the right to use their knowledge of local conditions. The Eureka Springs City Council's original taxing ordinance was more inclusive, but it had to be amended because the State's enabling act denied them the right to tax other tourist-related businesses. The State statute keeps the local ordinance underinclusive.

The Arkansas Supreme Court has held that all reasonable doubts are to be resolved in favor of the taxing statute (p. a-5, opinion). The plaintiff has the burden of overcoming this presumption. This puts an impossible burden of proof upon the plaintiff. It is even greater than that placed on the prosecution in a criminal case. In a criminal trial the prosecution has to prove the positive elements of the crime and rebut any defenses beyond a reasonable doubt. In a tax case the plaintiff must not only rebut any defenses, but must also prove the absence of all justification, whether heretofore alleged by the State or

not. There is not even a set of defined elements on which the plaintiff must present evidence. Therefore, the presumption that a state tax statute is reasonable and justified is even greater than the presumption that a criminal defendant is innocent. We respectfully submit that the Equal Protection Clause of the Constitution is supposed to be protection of the citizenry against the state, not of the state against the citizenry.

Lindsley v. Natural Carbonic Gas Company, 220 U.S. 61 (1911) states that,

> "if any state of facts reasonably can be conceived that would sustain [the difference in treatment], the existence of that state of facts at the time the law was enacted must be assumed." (p. 78)

Does this burden of proof mean that the plaintiff must negate every possible reason for different tax treatment, even those justifications developed *sua sponte* by the justices when writing their opinions? The problem becomes one of rebutting a state of facts before it is conceived. If this is the burden placed on the plaintiffs, then it is an impossible burden and negates completely the application of the Equal Protection Clause to the states' taxing power.

In the alternative, we submit that the Court hold that any justification for differences in taxation put forth by the state would be presumed to be reasonable, and the plaintiff would then have the burden of proving otherwise. This would at least give the plaintiff a chance to present proof on the various justifications.

If a court should develop their own possible justifications, the case should at least be remanded to allow the plaintiff to present evidence.

II. STANDING TO ATTACK THE CONSTITUTIONALITY OF A STATUTORY PROVISION.

The Arkansas Supreme Court held that the plaintiff did not have standing to attack a remedial provision in the taxing statute whereby aggrieved parties could bring the city council's ordinance before a vote of the people. Without deciding the constitutionality of such a section the court pointed to *another* remedy, not provided in the statute. Can a court side-step the issue of constitutionality by simply holding that the statute attacked is not the exclusive remedy? The availability of alternative means by which the ordinance may be submitted to the electorate has no bearing on whether the means provided by the statute in question was in violation of the Equal Protection Clause. Under the Arkansas Supreme Court's decision, *no* one would have standing to question the constitutionality of this statutory provision.

CONCLUSION

For the reasons set out in this petition, the Court should issue a writ of certiorari, and set the case down for plenary consideration with briefs on the merits and oral argument.

Respectfully submitted,

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Appendix "A"

SUPREME COURT OF ARKANSAS

No. 73-81

MAURY D. DICKS, ET AL V. FRED NAFF, MAYOR, ET AL	Opinion Delivered OCT. 22, 1973 APPEAL FROM CARROLL CHANCERY COURT WESTERN DISTRICT TED P. COXSEY, *Chancellor* AFFIRMED

FRANK HOLT, *Associate Justice*

Appellants attack the constitutionality of Ark. Stat. Ann. §19-4613 et seq. (Supp. 1971) (Act 185 of 1965 as amended), which is enabling legislation, and also the constitutionality of an implementing ordinance of the City of Eureka Springs. The city ordinance, as permitted by the enabling act, levied a 1% tax upon the gross receipts or proceeds of motels, hotels and restaurants, owned and operated by appellants, for the purpose of advertising and constructing facilities in the promotion of tourism.

Appellants first contend that the chancellor erred in declaring the enabling act and the implementing ordinance constitutional. It is appellants' position that the enabling act is unreasonable and arbitrary and without just distinction creates a separate class for taxation consisting only of hotels, motels and restaurants to bear the brunt of the total cost of promoting tourism. Further, appellants contend that the classification does not rest upon some ground of difference having a fair and substantial relation to the object

of the legislation so that all persons similarly situated shall be treated alike. Therefore, it is asserted that the enabling act as well as the implementing ordinance is violative of the due process and equal protection clauses of the Fourteenth Amendment of the Federal Constitution.

We first review the controlling rules of statutory construction with reference to the validity of legislation in the area of taxation. In the early case of *Green, et al, v. Frazier,* 253 U.S. 233 (1920), the court said:

> When a state legislature acts within the scope of its authority it is responsible to the people, and their right to change the agents to whom they have entrusted the power is ordinarily deemed a sufficient check upon its abuse. When the constituted authority of the State undertakes to exert the taxing power, and the question of the validity of its action is brought before this court, every presumption in its favor is indulged, and only clear and demonstrated usurpation of power will authorize judicial interference with legislative action.

In *Madden v. Kentucky,* 309 U.S. 83 (1940), where a state tax set different rates on bank deposits in the state from those out of state, the United States Supreme Court held that the tax was consistent with due process and equal protection. The court said that "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes." Again it was emphasized that "[T]he burden is on the one attacking the

legislative arrangement to negative every conceivable basis which might support it." Neither is the state "required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value." *Allied Stores v. Bowers,* 358 U.S. 522 (1959). Nor is a legislature required to make meticulous adjustments in an attempt to avoid incidental hardships. *Rapid Transit Corp. v. New York,* 303 U.S. 573 (1938). However, as appellants assert, "[T]he State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary." *Allied Stores v. Bowers, supra.* The mere fact that a taxation statute is discriminatory in favor of one class is not sufficient to make it arbitrary if that discrimination is based upon a reasonable distinction or if any facts can reasonably be conceived to sustain the act and a difference need not be great. *Tax Commissioners of Indiana v. Jackson,* 283 U.S. 527 (1931), and *Allied Stores v. Bowers, supra.*

To meet equal protection and due process requirements the legislative classification for the purpose of taxation must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly situated shall be treated alike. *Royster Guano Co. v. Virginia,* 253 U.S. 412 (1920), and *Larey, Comm'r v. Cont. Southern Lines,* 243 Ark. 278, 419 S.W. 2d 610 (1967). A classification is permissible if the differences in the impact of the act are reasonably related to the purpose of the law. *Jacks v. State,* 219 Ark. 342, 242 S.W. 2d 704 (1951). With respect to the extent of the great freedom of the legislature in exercising its broad and discretionary powers in the area of taxation, it was said in *Carmichael v. Southern Coal Co.,* 301 U.S. 495 (1937):

A legislature is not bound to tax every member of a

> class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it.

In *Carmichael* the Alabama Unemployment Compensation Act established a tax scheme levied on employers of eight or more persons for twenty or more weeks in the year. Addressing the numerical requirements, the court said:

> Yet this is the type of distinction which the law is often called upon to make. It is only a difference in numbers which marks the moment when day ends and night begins, when the disabilities of infancy terminate and the status of legal competency is assumed. It separates large incomes which are taxed from the smaller ones which are exempt, as it marks here the difference between the proprietors of larger businesses who are taxed and the proprietors of smaller businesses who are not.

To the same effect is *Potts v. McCastlain, Comm'r,* 240 Ark. 654, 401 S.W. 2d 220 (1966), where we recognized that the mere fact that a classification made by the state is unfair and unequal is not sufficient for invalidating the statute inasmuch as any system of taxation results in many inequalities and perhaps unfairness to particular classes. "This arises more often, not out of the law itself, but out of the peculiar conditions under which classes, or individuals, may find themselves in their manner of doing business or location, rather than out of the classification."

In *Madden v. Ky., supra,* it was said "[t]his court fifty years ago concluded that 'the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation' and the passage of time has only served to

underscore the wisdom of that recognition of the large area of discretion which is needed by a Legislature in formulating sound tax policies."

Thus, the foregoing authority permits the state legislatures to classify certain groups for taxation purposes if a rational basis exists and if a difference is reasonably related to the purpose of the law. A presumption of validity attends such legislation with all doubts being resolved in its favor. The appellants must shoulder the heavy burden of demonstrating that this type legislation can conceivably have no rational basis. In our view the legislature, by its democratic process of conducting public hearings before committees and the free and open discussions by its members in that forum could very well have determined that the greatest income from the tourist dollar would be to the advantage of the members of this particular class. It is common knowledge from time immemorial that the traveler or tourist primarily must first have lodging and food in the area in which he sojourns.

Therefore, in the case at bar we hold, and appellants cite no cases to the contrary in this factual situation, that the enabling act has a rational basis and appellants' classification has a fair and substantial relation to its objective.

The appellants, as previously indicated, next assert the unconstitutionality of the implementing ordinance on the same basis they attacked the enabling act: i.e., that it has no rational basis and the difference in the effect of the ordinance on other persons similarly situated is not reasonably related to the purpose of the law. It was stipulated that hotels and motels derive 97.5% of their income from tourist trade and that 90% is derived by restaurants and other eating establishments. In arriving at these percentage figures, it was agreed that seventeen motels and hotels,

five restaurants, cafes and cafeterias were considered. This constituted appellants' classification. It was further stipulated that other businesses which were untaxed derived the following percentage of their gross receipts from the tourist trade: campgrounds (1) 100%, gas stations (8) 66%, gift shops (12) 86%, art galleries (3) 88%, liquor stores (3) 53%, grocery stores (2) 50%, toy stores (1) 75%, antique shops (3) 90%, museums (1) 90%, cheese shops (1) 70%. There was evidence adduced, however, that there was actually a total of twenty-five restaurants, thirty-two motels and two campgrounds. It was agreed that the stipulated percentages do not take into account any differences in the amount of gross receipts derived by the various business establishments from tourism. Certainly this is a distinction.

Very quickly we observe that it could reasonably be inferred by the legislative authorities that the gross receipts of those businesses constituting the classification could be greatly in excess of the gross receipts of those untaxed businesses which also benefit from the tourist trade. It is, further, observed that the stipulated percentages of gross receipts derived from tourism are not weighted in terms of the number of businesses in each sub-class.

The two campgrounds are obviously different from hotels and motels inasmuch as the traveler or tourist using them must have with him and furnish most of the necessary facilities for lodging. As to the other untaxed businesses, there also exist differences in "organization, management, and type of business transacted." See *Tax Commissioners of Indiana v. Jackson, supra.*

In the case at bar, the ordinance earmarked the funds for expenditure in advertising and providing facilities to promote the tourist industry in that locality. In *New York*

Rapid Transit Corp. v. City of New York, supra, a tax was placed upon a classification of industries and earmarked the revenues to relieve unemployment. Even though the funds were earmarked to be spent for that purpose, it was said that the purpose or object of the tax law was to raise revenue. The court said:

> We conclude, therefore, that the provisions of the legislation earmarking the funds collected are not of importance in determining whether or not the classification of the challenged acts is discriminatory.

There it was further said that it is not constitutionally required that a classification for a tax be earmarked or related to the appropriation of the proceeds. *New York Rapid Transit Corp. v. City of New York, supra.*

In other words, it was there stated the controlling "object" or purpose "is the revenue to be raised by the acts." We hold that whether the object or purpose of the act and implementing ordinance was merely for raising revenue or its object or purpose was to spend revenue to promote tourism as earmarked by the act, in either event, the appellants have not discharged the heavy burden of proof which they must shoulder to demonstrate the enabling act and implementing ordinance have no rational basis and are not reasonably related to the purposes of the legislation. As previously observed, the legislature could logically and practically envision that appellants, as a classification, would be the beneficiary of not only as great or greater percentage of the tourist dollar (as stipulated) — they also would benefit from much greater gross receipts and profits than the untaxed businesses which also derive a benefit from the sojourner or tourist.

Appellants next contend that the provision in the

enabling act providing for a referendum upon the petition of 500 electors is not severable and, further, it is unconstitutional in that it arbitrarily and capriciously discriminates against the smaller cities of the first class (1,500). Eureka Springs is a city of approximately 1,600 population and about 1,233 are qualified electors. At the last general election, a total of 833 voted for a mayor. We hold that the provision requiring 500 petitioners is severable inasmuch as the enabling act is not dependent upon this provision nor are we of the view that the legislature would have refused to enact the legislation without this number. In fact the legislature, in plain and explicit language in a severability clause, provided that any portion of the act was severable to insure its validity. Furthermore, we do not consider that the appellants are in a position to attack this proviso inasmuch as they did not avail themselves of Amendment 7, §1, of our constitution which permits them to refer any city ordinance to a general election upon the petition of 15% of the local voters of that city. That would have only required approximately 125 petitioners to refer this ordinance to the voters for approval. In oral argument appellees agreed this was a permissible procedure. In the event the petitioners of a city of the first class desire to utilize Amendment 7 as an alternative, that is permissible.

Finally, the appellants assert the chancellor erred in admitting the testimony of Dr. Charles E. Venus, an expert witness, as to the results of his statewide and local surveys with respect to tourism. A sufficient answer is that, although the chancellor permitted the witness to testify, he specifically found in the decree that appellants' objection to the testimony was sustained and consideration of the testimony was excluded by him in the determination of the issues.

Affirmed.

Appendix "B"

TEXT OF ARKANSAS STATUTE
§§ 19-4613 to 4617 (Supp. 1937)

Ark. Stat. 19-4613. *Hotels and restaurants — Gross receipts tax authorized — Petitions.* — Any city of the first class may by ordinance of the governing body thereof, levy a tax of one per cent (1%) upon the gross receipts or gross proceeds from the renting, leasing or otherwise furnishing of hotel or motel accommodations for profit in such city, and upon the gross receipts or gross proceeds of restaurants, cafes, cafeterias and other establishments, as defined in the levying ordinance, engaged in the business of selling prepared food for consumption on the premises in such city. Provided, that any city of the first class in which is located a national park may by ordinance of the governing body thereof, levy a tax of not to exceed two per cent (2%) upon the gross revenues or gross proceeds from the renting, leasing, or otherwise furnishing of hotel or motel accomodations [accommodations] for profit in such city, and upon the gross receipts or gross proceeds of restaurants, cafes, cafeterias and other business establishments as defined in the levying ordinance, engaged in the business of selling prepared food for consumption on the premises in such city. Provided, the governing body of a city levying the tax herein authorized shall submit the question of levying such tax to the electors of such city if petitions signed by not less than five hundred (500) qualified electors of the city, requesting the same, are filed with the governing body within thirty (30) days after the adoption of the ordinance levying the tax. [Acts 1965, No. 185, § 1, p. 579; 1969, No. 123, § 1, p. 364; 1971, No. 534, § 1, p. 1170.]

Amendments.

The 1969 amendment in the first sentence deleted "having a population of not less than 25,000 inhabitants according to the most recent Federal census" following "any city of the first class."

The 1971 amendment inserted the first proviso.

Separability.

Section 3 of Acts 1971, No. 534, read: "If any provision of this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable."

19-4616. *Advertising and promotion commission — Membership — Qualifications — Terms.* — Any city levying a tax pursuant to this Act [§§ 19-4613 — 19-4617] shall, in the ordinance levying the tax, create a City Advertising and Promotion Commission, to be composed of seven [7] members as follows: Four [4] members shall be hotel, motel or restaurant owners or managers, who shall be appointed by the mayor with the approval of the governing body of the city, for staggered terms of four (4) years; the remaining three [3] members of the Commission shall be the mayor and two [2] members of the governing body of the city selected by the governing body. In the case of cities levying the tax and creating the Commission authorized herein after July 1, 1969, the four [4] hotel, motel or restaurant members appointed by the mayor shall, at the first meeting of the Commission draw lots for terms so

that one [1] of such members will serve for a term of one (1) year, one [1] shall serve for a term of two (2) years, one [1] shall serve for a term of three (3) years, and one [1] shall serve for a term of four (4) years, and all successors to such members shall be appointed for terms of four (4) years. In the case of those Commissions which are in existence on July 1, 1969, the terms of all members on such Commissions shall expire on July 1, 1969, and the Commission shall be reconstituted as herein provided and the hotel, motel and restaurant members shall, at the first meeting of the Commission after July 1, 1969 draw lots for terms so that one [1] member will serve for a term of one (1) year, one [1] member for a term of two (2) years, one [1] member for a term of three (3) years and one [1] member for a term of four (4) years, and their successors shall be appointed for terms of four (4) years. [Acts 1965, No. 85, § 5, p. 579; 1969, No. 123, § 2, p. 364.]

19-4617. *Use of funds collected — Convention centers — Bonds.* — A. All funds credited to the city advertising and promotion fund pursuant to this Act [§§ 19-4613 — 19-4617] shall be used for advertising and promoting such city and its environs and/or for the construction, reconstruction, extension, equipment, improvement, maintenance, repair and operation of a convention center or convention centers in such city, and facilities necessary for, supporting or otherwise pertaining to, a convention center, or for the payment of the principal of, interest on, and fees and expenses in connection with, bonds, as provided in this Act, in the manner as shall be determined by the City Advertising and Promotion Commission.

B. Cities of the first class levying the tax and creating the Commission as herein permitted, are hereby authorized to acquire sites for, construct, reconstruct, extend, equip, improve, maintain and operate convention centers and facilities necessary for, supporting or otherwise pertaining to, convention centers (collectively referred to herein as "convention center projects"), in such cities and are hereby authorized to issue bonds to provide funds for accomplishing convention center projects and to pledge all or any part of the revenues from the tax levied by such city pursuant to this Act, to pay the principal of, interest on, and fees and expenses in connection with such bonds.

(1) Bonds issued by a municipality pursuant to this Act shall be authorized by ordinance of the governing body of the City. The bonds may be coupon bonds payable to bearer, but subject to registration as to principal or as to principal and interest, may be exchangeable for bonds of another denomination, may be in such form and denominations, may be made payable at such places within or without the State, may be issued in one or more series, may bear such date or dates, may mature at such time or times, not exceeding forty (40) years from their respective dates, may bear interest at such rate or rates, not exceeding eight per cent (8%) per annum, may be payable in such medium of payment, may be subject to such terms of redemption and may contain such terms, covenants and conditions as the ordinance authorizing their issuance may provide, including, without limitation, those pertaining to the custody and application of the proceeds of the bonds, the collection and disposition of revenues, the maintenance of various funds and reserves, the nature and extent of the security and pledging of revenues, the rights, duties and obligations of the municipality and the trustee for the hold-

ers and registered owners of the bonds and the rights of the holders and registered owners of the bonds. There may be successive bond issues for the purpose of financing the same convention center project, and there may be successive bond issues for financing the cost of reconstructing, replacing, constructing additions to, extending, improving and equipping convention center projects already in existence, whether or not originally financed by bonds issued under this Act, and with each successive issue to be authorized as provided by this Act. Priority between and among issues and successive issues as to security of the pledge of revenues and lien on the convention center project facilities involved may be controlled by the ordinance authorizing the issuance of bonds hereunder. Subject to the provisions hereof pertaining to registration, the bonds shall have all the qualities of negotiable instruments under the laws of the State of Arkansas.

(2) The bonds shall be executed by the manual or facsimile signature of the Mayor of the city and by the manual signature of the Clerk or Recorder of the city. Coupons attached to the bonds shall be executed by the facsimile signature of the Mayor. In case any of the officers whose signatures appear on the bonds or coupons shall cease to be such officer before the delivery of the bonds or coupons, their signatures shall nevertheless be valid and sufficient for all purposes. The bonds shall be sealed with the seal of the city issuing the bonds.

(3) The bonds shall not be general obligations of the city involved but shall be special obligations secured and payable as herein provided. In no event shall the bonds constitute an indebtedness of the city within the meaning of any constitutional or statutory limitation. The principal of and interest on all bonds issued under the authority of

this Act shall be secured by a pledge of, and shall be payable from all or any part of the revenues derived from the gross receipts tax levied by the city pursuant to this Act and/or from all or any part of the revenues derived from the operation of the convention center project involved. The ordinance authorizing the issuance of bonds together with this Act shall constitute a contract by and between the city and the holders and registered owners of all bonds issued by the city under the authority of this Act, which contract, and all covenants, agreements and obligations therein shall be promptly performed in strict compliance with the terms and provisions of the contract, and the contract and all rights of the holders and registered owners of the bonds and the obligations of the city may be enforced by mandamus or any other appropriate proceeding at law or in equity. It shall be plainly stated on the face of each bond that it has been issued under the provisions of this Act.

(4) Bonds issued under the authority of this Act are hereby made securities in which insurance companies, trust companies, banks, investment companies, executors, administrators, trustees and other fiduciaries may properly and legally invest funds, including capital in their control or belonging to them. Such bonds are hereby made securities which may properly and legally be deposited with and received by any state or municipal officer or any agency or political subdivision of the State for any purpose for which the deposit of bonds or obligations of the State is now or may hereafter be authorized by law. Any municipality or county, or any board, commission or other authority duly established by any such municipality or county, or the Boards of Trustees, respectively, of any retirement fund or retirement system created by or pursuant

to authority conferred by the General Assembly of the State of Arkansas may, in its discretion, invest any of its funds not immediately needed for its purposes in bonds issued under the authority of this Act, and bonds issued under the authority of this Act shall be eligible to secure the deposit of public funds.

(5) The principal of and interest on bonds issued under the authority of this Act shall be exempt from all State, County and Municipal taxes, except property taxes, and this exemption shall include income, inheritance and estate taxes.

C. Any city of the first class levying the tax and creating the Commission as herein permitted is hereby authorized to pledge all or any part of the revenues from the tax levied pursuant to this Act to the payment of principal of and interest on bonds issued by such city under the authority of any other law, now or hereafter in effect, for the purpose of providing all or part of the funds for the acquisition, construction, reconstruction, extension, equipment, improvement, maintenance or operation of any facility or facilities (including, without limitation, auditoriums and parking facilities) which are or will be operated as a part of, or operated or utilized in connection with or in support of, a convention center project or projects. [Acts 1965, No. 185, § 6, p. 579; 1969, No. 123, § 3, p. 364; 1970 (Ex. Sess.), No. 58, § 1, p. 194; 1971, No. 188, § 1, p. 435.]

Appendix "C"

TEXT OF EUREKA SPRINGS ORDINANCE NO. 936 AND NO. 942

ORDINANCE NO. 936

AN ORDINANCE LEVYING A TAX UPON THE GROSS RECEIPTS OF HOTELS, MOTELS, RESTAURANTS, CAFES, AND CAFETERIAS IN THE CITY; PRESCRIBING THE PROCEDURE FOR THE COLLECTION AND ENFORCEMENT OF THE TAX; PRESCRIBING THE PURPOSES FOR WHICH REVENUES DERIVED FROM COLLECTION OF THE TAX MAY BE USED; CREATING A CITY ADVERTISING AND PROMOTION COMMISSION; PRESCRIBING OTHER MATTERS PERTAINING THERETO; AND DECLARING AN EMERGENCY.

WHEREAS the City of Eureka Springs, Arkansas hereinafter called "the City," has many benefits to offer visitors to the City and is presently unable to take full advantage of its resources for the attraction of visitors; and

WHEREAS the development of such resources and facilities would result in many economic and other benefits to the City and its inhabitants; and

WHEREAS the General Assembly of the State of Arkansas adopted Act 185 of 1965, as amended by Act 30 of the First Extraordinary Session of 1965 and further amended by Act 123 of 1969, to provide a means by which the City can obtain the needed funds.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF EUREKA SPRINGS, ARKANSAS:

SECTION 1. DEFINITIONS

1. Gross Receipt Tax. A tax of one per cent upon the gross receipts or gross proceeds from the renting, leasing or otherwise furnishing of motel, hotel or camper park accommodations and upon the gross receipts or gross proceeds of restaurants, cafes and cafeterias in the City of Eureka Springs, Arkansas.

2. Hotel or Motel Accommodations. The renting, leasing or otherwise furnishing of accommodations in hotels, motels or camper parks upon a day to day basis or a week to week basis. Provided, however, that this shall not include the renting, leasing or furnishing of accommodations upon month to month tenancies or tenancies of a longer duration.

3. Restaurants and Cafes. Any establishment which shall offer any type of prepared foods for sale, and shall include the gross receipts upon all sales of prepared foods on any type of beverages prepared for consumption on or off the premises.

SECTION 2. CREATION OF CITY TOURIST PROMOTION COMMISSION AND FUND.

1. Commission Created.

The City Tourist Promotion Commission hereinafter called "the Commission," is hereby created. The Commission shall be composed of seven (7) members who shall be qualified electors of the City of Eureka Springs. Four (4) members of the Commission shall be hotel, motel or restau-

rant owners or managers, and the remaining members of the Commission shall be the Mayor and two (2) members of the City Council of Eureka Springs. The members of the Commission shall be appointed by the Mayor of the City of Eureka Springs, with the approval of the Eureka Springs City Council. The appointment of members of the Commission shall be for terms of four (4) years. Provided, however, the first members appointed to the Commission as owners or managers shall serve for terms of one, two, three and four years with the term of each member to be determined by lot at the first meeting of the Commission. Successor members shall be appointed for the full term of four (4) years. In the event of a vacancy occurring on the Commission, it shall be filled by appointment by the Mayor, subject to the approval of the Eureka Springs City Council. Each commissioner shall file the oath required by law in the State of Arkansas of public officials. Each commissioner shall furnish to the City of Eureka Springs a Five Thousand and 00-100 ($5,000.00) Dollars surety bond that will serve to insure the City against misappropriation or mishandling of funds. The surety on said bond shall be a reputable surety corporation. The premium on this bond shall be paid from the Eureka Springs Tourist Promotion Fund. Any Commissioner appointed under the provision of this Ordinance may be removed for cause upon a two-thirds (2-3) vote of the Eureka Springs City Council.

2. Fund Created. The funds received by the Commission under the provisions of this Ordinance shall be paid into the Eureka Springs Tourist Promotion Fund, hereinafter called "the Fund". All revenues so collected shall be used exclusively for development of tourist facilities in the City of Eureka Springs and for advertising and promotion of the City of Eureka Springs.

3. Restriction On Use. All revenues received by the Commission, pursuant to Act 185 of 1965 as amended by Act 30 of the First Extraordinary Session of 1965 and by Act 123 of 1969, shall be "Special Revenues", and shall be deposited by the Commission into the Fund in such bank account or accounts as may be designated by the Commission.

SECTION 3. GROSS RECEIPTS TAX

1. Tax Levy. From and after the passage and approval of this Ordinance a tax in the sum of one per cent shall be levied upon the gross receipts or gross proceeds upon the renting, leasing or otherwise furnishing of hotel, motel, or camper park accommodations for profit, and upon the gross receipts or gross proceeds of restaurants and cafes within the corporate limits of the City of Eureka Springs, Arkansas.

2. Taxable Businesses. The City Tourist Promotion Commission shall prepare and maintain a current list of the business establishments in the City of Eureka Springs, subject to the above tax.

3. Tax Collection. The tax herein levied shall be paid by the persons, firms or corporations liable therefor, and shall be collected by the City Tourist Promotion Commission in the same manner and at the same time as the gross receipts tax levied by Act 386 of 1941 as amended. All the provisions of Act 386 of 1941 as amended, and the rules, regulations and forms promulgated and prescribed by the Commissioner of Revenues pursuant to said Act shall, so far as practicable, be applicable with respect to the enforcement and collection of the tax levied pursuant to this Ordinance.

SECTION 4. ORGANIZATION OF COMMISSION — POWERS AND DUTIES.

A. The Commission shall meet within two (2) weeks of its appointment and shall be organized by electing a Chairman, a Secretary and a Treasurer. Thereafter, the Commission shall meet as often as may be necessary, and also shall be subject to special call by the Chairman.

B. The commissioners shall adopt such rules and regulations as they may deem necessary and expedient for the proper operation of said commission, and they shall have the authority to alter, change or amend such rules and regulations at their discretion.

C. The Commission hereunder appointed shall have the exclusive authority to utilize all revenues collected in the Fund for the development of tourist facilities, advertising and tourist promotion of the City of Eureka Springs. The advertising and tourist promotion of the City of Eureka Springs may be defined by the Commission to mean any activity connected with tourism, with special emphasis to development of convention and parking facilities.

D. The commissioners hereunder appointed, in addition to their other powers enumerated herein, shall have the exclusive right and power to make purchases of all supplies necessary for the management and operation of the Commission.

E. The commissioners shall have authority to employ the necessary personnel to assist in the administration and operation of the Fund and shall have the authority to fix the salary or salaries for such personnel. Any employee who shall handle funds for the Commission shall be required to furnish the City a surety bond in an amount to be

determined by the Commission to insure the City against misappropriation of funds.

F. The commissioners shall make quarterly reports to the Mayor and City Council of the City of Eureka Springs beginning three (3) months after their oath of office, reporting in full on the operations of the Commission, including an accounting of receipts and disbursements, and shall upon request of the Eureka Springs City Council furnish such other and further reports and data as may be required. The commissioners shall select a recognized auditing firm to submit an annual audit of the operations of the Commission to the Mayor and City Council of the City of Eureka Springs.

SECTION 5. CONFLICTS AND EMERGENCY CLAUSE.

1. Repeal. All ordinances and resolutions, and parts thereof, in conflict, in whole or in part, with any of the provisions of this Ordinance are hereby repealed to the extent of such conflict.

2. Severability. The provisions of this Ordinance are hereby declared to be severable. If any provision shall be held to be invalid or to be inapplicable to any persons or circumstances, such invalidity or inapplicability shall not affect the remainder of the provisions of this Ordinance.

3. Emergency Clause. It has been found, and it is hereby declared, that the City badly needs additional revenues for the development of a convention center and parking facilities and for the advertising and promotion of the City; that this Ordinance and the tax levied by it are the only reasonable means available for the alleviation of these needs; and that the advertisements and promotion of the

City and the development of a convention center are essential to the continued development of the City and to the welfare of the inhabitants thereof. This Ordinance, therefore, being necessary for the preservation of the public peace, health and safety, an emergency is declared to exist and this Ordinance shall be in effect from and after its passage and approval.

PASSED AND APPROVED by the City Council of Eureka Springs, Arkansas, this 4th day of May, 1972.

FRED L. NAFF, MAYOR

ATTEST:
KATHERINE GREEN, CITY CLERK

ORDINANCE NO. 942

AN ORDINANCE AMENDING ORDINANCE NO. 936, BY DELETING ALL REFERENCES THEREIN TO APPLICATION OF THE TAX LEVY ON CAMPER PARK ACCOMMODATIONS, AND DECLARING AN EMERGENCY.

WHEREAS the City Council of Eureka Springs, Arkansas, passed and approved Ordinance No. 936 on the 4th day of May, 1972; and

WHEREAS said Ordinance, through clerical misprision, contained language including the application of the regulation to camper park accommodations without statutory authority therefor.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF EUREKA SPRINGS, ARKANSAS:

I.

That Sections 1 and 3 of Ordinance No. 936 are amended to read in their entirety as follows:

SECTION 1. DEFINITIONS

1. Gross Receipt Tax. A tax of one per cent upon the gross receipts or gross proceeds from the renting, leasing or otherwise furnishing of motel or hotel accommodations, and upon the gross receipts or gross proceeds of restaurants, cafes and cafeterias in the City of Eureka Springs, Arkansas.

2. Hotel or Motel Accommodations. The Renting, leasing or otherwise furnishing of accommodations in hotels or motels upon a day to day basis or a week to week basis. Provided, however, that this shall not include the renting, leasing or furnishing of accommodations upon month to month tenancies or tenancies of a longer duration.

3. Restaurants and Cafes. Any establishment which shall offer any type of prepared foods for sale, and shall include the gross receipts upon all sales of prepared foods on any type of beverages prepared for consumption on or off the premises.

SECTION 3. GROSS RECEIPTS TAX

1. Tax Levy. From and after the passage and approval of this ordinance, a tax in the sum of one percent shall be levied upon the gross receipts or gross proceeds upon the renting, leasing or otherwise furnishing of hotel or motel accommodations for profit, and upon the gross receipts or gross proceeds of restaurants and cafes within the corporate limits of the City of Eureka Springs.

2. Taxable Business. The Commission shall prepare and maintain a current list of the business establishments in the City of Eureka Springs subject to the above tax.

3. Tax Collection. The tax herein levied shall be paid by the persons, firms or corporations liable therefor, and shall be collected by the Commission in the same manner and at the same time as the gross receipts tax levied by Act 386 of 1941, as amended. All the provisions of Act 386 of 1941, as amended, and the rules, regulations and forms promulgated and prescribed by the Commissioner of Revenues pursuant to said Act shall, as far as practicable, be applicable with respect to the enforcement and collection of the tax levied pursuant to this Ordinance.

II.

That all ordinances and resolutions, and all parts thereof, in conflict, in whole or in part, with any of the provisions of this Ordinance are hereby repealed to the extent of such conflict; and that, in the judgment of the City Council of Eureka Springs, Arkansas, the public peace, health and safety of the City and the inhabitants therefore demand the immediate passage of this Ordinance, and an emergency is hereby declared to exist whereby this Ordinance shall become effective from and after its passage, approval and publication as provided by law.

PASSED AND APPROVED by the City Council of Eureka Springs, Arkansas, this 7th day of September, 1972.

Fred L. Naff, Mayor

ATTEST:
Katherine Green, City Clerk
9-21-72

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MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1128

MAURY D. DICKS, et al.,
Petitioners,

v.

FRED NAFF, et al.,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1128

MAURY D. DICKS, et al.,
Petitioners,

v.

FRED NAFF, et al.,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Arkansas in this case has now been reported as **Dicks v. Naff**, 255 Ark. 357, 500 S.W. 2d 350 (1973).

QUESTIONS PRESENTED

The Points presented by Petitioners under the heading Questions Presented and the Points presented under the heading Arguments for the Allowance of the Writ do not coincide. Respondents will respond to the Points presented under Argu-

ments for the Allowance of the Writ and to Point III presented under the Questions Presented (as this Point III is not presented except under Questions Presented).

CONSTITUTIONAL PROVISION INVOLVED

In addition to the statutory and ordinance provisions presented in Petitioners' brief, this case also involves the following portion of Amendment No. 7 to the Arkansas Constitution, 1 Ark. Stat. Ann. 205 (1947):

Local Petitions

Municipalities and Counties—The initiative and referendum powers of the people are hereby further reserved to the local voters of each municipality and county as to all local, special and municipal legislation of every character in and for their respective municipalities and counties, but no local legislation shall be enacted contrary to the Constitution or any general law of the State, and any general law shall have the effect of repealing any local legislation which is in conflict therewith.

Municipalities may provide for the exercise of the initiative and referendum as to their local legislation.

General laws shall be enacted providing for the exercise of the initiative and referendum as to counties. Fifteen per cent of the legal voters of any muncipality or county may order the referendum, or invoke the initiative upon any local measures. In municipalities the number of signatures required upon any petition shall be computed upon the total vote cast for the office of mayor at the last preceding general election; in counties, upon the office of Circuit Clerk. In municipalities and counties the time for filing an initiative petition shall not be fixed at

less than sixty days nor more than ninety days before the election at which it is to be voted upon; for a referendum petition at not less than thirty days nor more than ninety days after the passage of such measure by a municipal council; nor less than ninety days when filed against a local or special measure passed by the General Assembly.

STATEMENT OF THE CASE

Respondents concur in most of the statements contained in Petitioners' Statement of the Case. However, Petitioners' statement (Petition, p. 5) that the challenged tax was levied on them or on their businesses is inaccurate. The tax actually is a tax on their customers, its manner of collection being to collect an additional 1% of the basic amount of all bills for food and lodging.

Petitioners also state that the stipulations of fact and testimony below "clearly establish that there is indeed another class of businesses in Eureka Springs, Arkansas, other than hotels, motels and restaurants, which is not subject to the tax, but which bears the same or similar relationship, if not identical, to the tourist trade as do hotels, motels and restaurants" (Petition, pp. 5-6). This is not a statement of "facts material to the consideration of the questions presented" as required by Rule 23 of this Court's Rules. It is a conclusion which was rejected by the trial court and the Supreme Court of Arkansas.

The facts, as stipulated below, that Petitioners fail to point out are as follows:

(1) All or nearly all of the gross receipts of hotels, motels, restaurants, cafes, and cafeterias (the types of businesses whose gross receipts are subject to the challenged tax) located in Eureka Springs, Arkansas, are derived from tourist trade.

(2) There are 32 hotels and motels in Eureka Springs which derive 97.5% of their gross receipts from tourist trade, and there are 25 restaurants, cafes, and cafeterias in Eureka Springs which derive 90% of their gross receipts from tourist trade.

(3) There is another class of businesses in Eureka Springs which derive nearly all, but a lesser percentage than hotels, motels, restaurants, cafes, and cafeterias, of their gross receipts from tourist trade.

(4) Included within this other class are two campgrounds, three antique shops, and one museum which derive, respectively, 100%, 90%, and 90% of their gross receipts from tourist trade. All other sub-classes within this class derive a lesser percentage of their gross receipts from tourist trade.

Petitioners offered no evidence as to the relative amounts of gross receipts derived by the various types of businesses from tourist trade.

ARGUMENTS FOR DENIAL OF THE WRIT

POINT I

Petitioners discuss the purpose of the challenged legislation as if the legislative bodies which enacted it were conducting some sort of personalized legal harassment against them or possessed some sinister and illegal motive. They have gone to great lengths to convince the Court that it must look to the real rather than some contrived purpose. They do not tell this Court what they would have it hold the purpose of the legislation to be, but they did tell the Supreme Court of Arkansas that the purpose of the legislation "is the promotion of tourism."

The Supreme Court of Arkansas accepted this contention when it said "[w]e hold that whether the object or purpose of the act and implementing ordinance was merely for raising revenue or its object or purpose was to spend money to promote tourism as earmarked by the act, in either event, the appellants have not discharged the heavy burden of proof which they must shoulder to demonstrate the enabling act and implementing ordinance have no rational basis and are not reasonably related to the purpose of the legislation" (Petition, p. a-7).

Petitioners attempt to make it appear that the Supreme Court of Arkansas relied entirely on the holding of **New York Rapid Transit Corp. v. New York,** 303 U.S. 573 (1938) and the rule there stated that the purpose of a taxing ordinance is to raise revenue (Petition, p. 14). As the above language shows, this is not true.

Petitioners state (Petition, p. 14) that the proper question is whether "this underinclusiveness or difference in treatment is based upon some reasonable, permissible ground, itself hav-

ing some relation to the object of the legislation." The Supreme Court of Arkansas specifically held that such a ground existed (Petition, p. a-7):

> As previously observed, the legislature could logically and practically envision that appellants, as a classification, would be the beneficiary of not only as great or greater percentage of the tourist dollar (as stipulated)—they also would benefit from much greater gross receipts and profits than the untaxed businesses which also derive a benefit from the sojourner or tourist.

Petitioners now quarrel with the only logical conclusions to be drawn from the very facts to which they stipulated.

Respondents themselves shouldered the burden of proving what it was Petitioners burden to disprove in regard to another ground of difference which supports the classification. At the trial expert testimony was offered to show that approximately 96% of all tourist dollars spent in Eureka Springs other than for travel are spent for food and lodging, and that nearly all of these expenditures are made in hotels-motels and restaurants.

Thus, by limiting the class of businesses whose gross receipts are subject to the challenged tax, the Legislature and City Council have taxed nearly all expenditures made by tourists in Eureka Springs, and tourism is being promoted with tourists' dollars. This evidence was later excluded by the trial court and was not considered by it or the Supreme Court of Arkansas because it was unnecessary. It is, however, clearly admissible and serves to show that no matter how light this Court might make the burden of proof in a case such as this Petitioners cannot prevail, for it would be impossible for them to disprove that this state of facts exists. In fact, even if the Court places the burden on Respondents to prove the existence of some ground of difference between the businesses whose gross receipts are taxed and those whose gross receipts are not taxed that

bears a reasonable relationship to the object of promoting tourism, Respondents have already met that burden and could do so again upon remand.

Petitioners' discussion of hypothetical cases is inapposite to this case. They state that, in regard to taxes, "in many instances raising money is purely incidental" (Petition, p. 14), yet they do not deny that the revenues raised by the challenged tax are essential to the fulfillment of the admitted purpose for which they are earmarked. They state that the "actual purpose of a statute may be regulation through taxation" (Petition, p. 14), yet they do not assert that such a purpose lies behind the challenged tax. They state that a "tax may be a sort of tariff to encourage one business or discourage another" (Petition, p. 14), yet no allegation is made that such a purpose is involved in this case. And in spite of Petitioners' concern about whether the courts look for the actual and real purposes as opposed to conceivable purposes in equal protection cases, the Supreme Court of Arkansas accepted as the purpose of the challenged tax the only purpose advanced by Petitioners, the promotion of tourism. Petitioners state that "[t]he Court should recognize the obvious purpose of a statute and should not try to credit the legislature with a more permissible motive" (Petition, p. 13). But Petitioners present no additional "real" purpose which the Supreme Court of Arkansas failed to consider, nor do they claim that it "conceived" other purposes that should not have been considered.

Petitioners also quarrel with the long and well established rule that the party challenging the constitutionality of a law must negative every state of facts that can reasonably be conceived to sustain it. In the absence of an express declaration of the factual basis for a legislative classification in the statute itself or within its legislative history, any state of facts which is presented as a basis for a classification is speculative to at least some degree. In this case Petitioners have conceived of

one factual basis upon which the legislative bodies **could** have grounded the classification and have attempted to disprove it (unsuccessfully in the eyes of both courts below). They have adamantly refused to recognize that there may be other factual bases that are equally or even more reasonable and which merit consideration. In effect, they assert that they have the privilege of speculating as to what the factual basis for the classification is but that Respondents do not.

In this case Petitioners had no problem of rebutting a state of facts before it was conceived, as they imply (Petition, p. 16), for several factual bases which serve to justify the classification were presented to the trial court but ignored by Petitioners. No new bases to sustain the classification were offered by either court below. Petitioners now complain that the law should be modified to insure that **all** plaintiffs have the chance they had to disprove the factual bases for a classification (Petition, p. 16).

Petitioners have engaged in an abstract discussion of several long and well established rules of law, which discussion has no bearing on this case. If all of Petitioners' arguments as to what the law should be are accepted, they still cannot prevail. Their problems in supporting their positions lie not with the law but with the facts.

Another and sufficient reason for denying the Petition is that this case does not have enough general importance to warrant the Court's attention. From June 1, 1972 to December 1, 1972, the City of Eureka Springs collected $14,768.13 pursuant to the tax. And even if the challenged tax in this case were to be held invalid, it would be because of the peculiar fact situation that is present in Eureka Springs. Eureka Springs had a population of 1,670 in 1970. Economically, it is dependent on tourism to a far greater extent than any other city in Arkansas as was brought out during the trial, or at least any other city in Arkansas that has enacted a tax pursuant to the

challenged state statute. The other cities which have done so and their populations as of the 1970 census are Little Rock, 132,483, Hot Springs, 35,631, Jonesboro, 27,050 and Texarkana, 21,682. Conditions in these cities obviously will differ substantially from the conditions in Eureka Springs which Petitioners claim support their contentions. In fact, no city in Arkansas is comparable to Eureka Springs as a tourist attraction or in its economic dependence on tourism. If this Court is to re-evaluate equal protection requirements in tax cases it could hardly choose a worse case in which to do so.

POINT II

Petitioners complain that they were denied standing to challenge the constitutionality of the provision in the enabling act for referring an implementing ordinance to the voters upon petition of 500 electors. Yet they ignore the holding that the election proviso, even if unconstitutional, is severable. The Supreme Court of Arkansas made the following statement (Petition, p. a-8):

> We hold that the provision requiring 500 petitioners is severable . . . [T]he legislature, in plain and explicit language in a severability clause, provided that any portion of the act was severable to insure its validity.

This holding is on a matter of state law and not subject to challenge here. Therefore the remainder of the enabling act would be unaffected by a holding that the election proviso is unconstitutional and arguments regarding it are now moot.

The Supreme Court of Arkansas acted properly in recognizing that Petitioners' argument regarding the election proviso was premised upon an incorrect statement of fact, namely that the election proviso (which requires 500 signatures) was Petition-

ers' only available election remedy (Petition, p. 12). The Court considered the whole scheme of applicable state laws, including Amendment No. 7 to the Arkansas Constitution which requires the signatures of only 15% of the qualified electors of any Arkansas municipality to refer any ordinance to a referendum election (or to initiate at any general election a repealing measure). This action by the Court was correct, for obvious reasons. See, *e.g.*, **Two Guys from Harrison-Allentown v. McGinley,** 366 U.S. 582 (1961), reh. den. 368 U.S. 869.

The Supreme Court of Arkansas observed that Petitioners would have had to obtain only approximately 125 signatures on a petition to refer the implementing ordinance to the voters for approval. Even now they may, by obtaining approximately the same number of signatures on a petition, submit to the voters of Eureka Springs in the upcoming 1974 election an ordinance repealing the implementing ordinance by means of an initiated measure.

POINT III

The Supreme Court of Arkansas did not consider any facts other than those supported by evidence properly before the Court and those of which it properly took judicial notice in reaching its decision in this case.

CONCLUSION

The decision of the Supreme Court of Arkansas is correct; it is in accord with the applicable decisions of this Court and the questions Petitioners seek to present here are insubstantial, moot, and/or unnecessary to decide. The Petition for a Writ of Certiorari should, therefore, be denied.

Respectfully submitted

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